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In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 293

CHARLES CLARENCE GARCIA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Rule 19 statement	2
Statutes involved	3
Statement of the case	5
Argument	5
Summary	6
	9

Table of Authorities Cited

Cases

	Pages
Griffin v. California, 380 U.S. 609	8
Leary v. U.S., 395 U.S. 6	4
Turner v. U.S., 396 U.S. 398	4

Statutes

21 U.S.C. 176a	2, 5, 8
28 U.S.C. 1254(1)	2

Constitutions

United States Constitution:	
Article III	5, 7
Fifth Amendment	2, 3, 4, 5, 8
Sixth Amendment	2, 3, 5, 7

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Petitioner Charles Clarence Garcia prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit which was rendered and entered on May 12, 1970 and which judgment affirmed his conviction.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed Appendix B annexed hereto.

JURISDICTION

On June 20, 1968 petitioner was found guilty by a jury in the United States District Court for Arizona on an indictment charging him with violating 21 U.S.C. 176a as follows: Count I (Conspiracy to smuggle marijuana) and Count II (Smuggling marijuana). Petitioner was found guilty by a jury on June 20, 1968 and sentenced on July 22, 1968 to Federal prison for a maximum of ten years upon each of said counts, see Appendix C, said sentences to run concurrently. The United States Court of Appeals for the Ninth Circuit rendered and entered its Judgment affirming said convictions on May 12, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented for review are:

(1) Did the trial court's instruction to the jury as to Count I (conspiracy), that from unexplained possession of marijuana, a presumption might be drawn that the fact of importation was known, constitute reversible error, because it effectively denied Petitioner his Fifth Amendment right against self-incrimination and his Sixth Amendment right to trial by jury on all disputed issues of fact?

(2) Did the trial court's instruction to the jury as to Count II (smuggling), that from unexplained possession of marijuana, a presumption might be drawn that the fact of importation was known, constitute re-

versible error, because it effectively denied Petitioner his Fifth Amendment right against self-incrimination and his Sixth Amendment right to trial by jury on all disputed issues of fact.

I. (3) Did the trial court's instruction to the jury as to Counts I and II, that from unexplained possession of marijuana a presumption might be drawn that the fact of importation was known, constitute reversible error, because said instruction has the effect of relieving the government from its constitutional burden of proof of an essential element in a criminal case and substitutes therefore a Congressional declaration that certain evidence shall be deemed sufficient to convict

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RULE 19 STATEMENT

The special and important reasons for a review on Writ of Certiorari are as follows:

The Court of Appeals' opinion affirming Petitioner's conviction is inconsistent, self-contradictory and erroneous, both factually and legally.

Said opinion holds that the use of the presumption instruction was reversible error as to co-defendant Mahoney on the conspiracy count, but also holds that the use of the same instruction was harmless error and reversible as to petitioner, who was co-defendant with Mahoney on the conspiracy count. The key to the Appellate Court's factual error in this connection is provided by the Appellate Court's erroneous factual

declaration that Mahoney's case differed from Petitioner's in that Mahoney was not apprehended in the act of crossing the border, and by implication that Petitioner was. As a matter of fact, Petitioner was not apprehended in the act of crossing the border, but was 13 miles away at the time of his arrest by State Police officers who thereafter turned him over to Border Police, who thereafter returned Petitioner to the border.

In addition, the Court of Appeals, after declaring that it was bound in Petitioner's case by the rulings of this Court in *Leary v. U.S.*, 395 U.S. 6 and *Turner v. U.S.*, 396 U.S. 398, held in the first part of its opinion that the presumption instruction given by the trial judge was constitutionally erroneous as applied to Petitioner. Later, however, the Appellate Court opinion proceeded to pull the rug out from under its earlier holding by following the so-called Leary case guidelines that a constitutional error may nevertheless become harmless error if, in the opinion of the Appellate Court, the facts of the case would have convinced the jury beyond a reasonable doubt that Petitioner was guilty.

Petitioner's contention is that when the Appellate Court declared the use of the presumption by the trial judge in his instructions to the jury to be constitutional error, Petitioner was entitled to the benefit of that ruling, and any other ruling or holding by the Appellate Court in the same decision to the contrary is in violation of Petitioner's Fifth Amendment right to due process of law.

This should be particularly true where, as in Petitioner's case, the constitutional error specified by the Appellate Court resulted from a declaration by the trial court in the form of an instruction which, in fact, shifted the burden of proof from the government to the defendant.

It is respectfully contended in this Petition that this Court should clarify, declare and establish that the constitutional error committed by the trial court in Petitioner's case was reversible error, and in fairness to Petitioner, cannot be deemed harmless error by judicial fiat.

STATUTES INVOLVED

This case involves 21 U.S.C. §176a; United States Constitution Article III, and Amendments V and VI. See Appendix A.

STATEMENT OF THE CASE

Petitioner was indicted with Mahoney, Lewis, Arellano and Cortez and charged with violation of 21 U.S.C. 176a, Count I (Conspiracy to smuggle marijuana) and Count II (Smuggling of marijuana).

Lewis and Cortez were severed from Petitioner's trial in order to permit them to testify for the government.

The jury, after being instructed by the trial court pursuant to 21 U.S.C. 176a that from unexplained possession of marijuana a presumption may be drawn

that the fact of importation was known; found Petitioner guilty of Count I and Count II and found Mahoney guilty of Count I.

On Appeal the Circuit Court affirmed Petitioner's convictions on both Counts but reversed Mahoney's conviction on Count I.

In reversing as to Mahoney the Court held that the presumption instruction was reversible error because, "Mahoney was not apprehended in the act of crossing the border". As to Petitioner, however, the Court held that the instruction was harmless error because, by an implied finding of fact, Petitioner was apprehended in the act of crossing the border.

As a matter of fact, Petitioner, like Mahoney, was not apprehended in the act of crossing the border and said implied finding of fact to the contrary by the Appellate Court was not only gratuitous but erroneous.

For a full statement of the facts Petitioner adopts the opinion of the Court of Appeals. See Appendix B, page iii, fn. 1 and makes the same a part hereof by reference thereto.

ARGUMENT

1. Counts I and II of the indictment against Petitioner charged Petitioner with conspiracy to smuggle and with smuggling marijuana which he knew was illegally imported into the United States.

2. For a conviction it was necessary for the government to prove each of the elements of the crime

charged, and in particular, the element of knowledge of the illegal importation, to the satisfaction of the jury and beyond a reasonable doubt.

3. In Petitioner's case, proof of knowledge of illegal importation was by-passed and the presumption instruction was substituted in its place.

4. This had the effect of denying to Petitioner the presumption of innocence, of shifting the burden of proof as to a vital element of the crime charged from the government to the Petitioner; of forcing the Petitioner to choose between his constitutional right against self-incrimination or suffering the effects of the presumption; and, of denying to Petitioner his right to confront his accusers.

5. In any event, the fact question of Petitioner's knowledge of the importation of the marijuana was removed from the consideration of the jury and replaced by a Congressional declaration that certain evidence shall be sufficient to convict.

6. As a consequence of the giving of the presumption instruction, the jury was prevented from making a free and unhampered determination of guilt or innocence as the jury trial provisions of Article III of the Constitution and the Sixth Amendment require, and the giving of said instruction impermissibly interfered with the defendant's Sixth Amendment right to have the jury determine when evidence is sufficient to justify a finding of guilt beyond a reasonable doubt.

7. Finally, as to burden of proof, the statutory presumption instruction given in Petitioner's case is to-

tally unconstitutional for the reason that it robbed the defendant of at least a part of his presumed innocence and cast upon him the burden of proving that he is not guilty.

The presumption in 21 U.S.C. 176a makes this shift of burden of proof explicit. It tends to coerce and compel the defendant into taking the witness stand in his own behalf in clear violation of his Fifth Amendment privilege against self-incrimination.

This privilege has been interpreted constantly to establish the defendant's absolute right not to testify at his own trial unless he freely chooses to do so and the privilege is fulfilled only when a person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.

The defendant's right to free and unfettered choice in whether or not to testify is effectively destroyed by the coercive effect of the statutory presumption found in 21 U.S.C. 176a.

8. Moreover, when the defendant declined to testify and the trial judge gave the presumption instruction as he did in Petitioner's case, said instruction was nothing less than judicial comment upon the defendant's failure to testify, a practice held by this Court to be violative of the self-incrimination clause of the Fifth Amendment. *Griffin v. California,* 380 U.S. 609.

SUMMARY

For each and every of the reasons stated, it is respectfully submitted that this Court should reverse Petitioner's conviction under Counts I and II and remand Petitioner's case for new trial.

Dated, San Francisco, California,
June 17, 1970.

Respectfully submitted,
GEORGE T. DAVIS,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

UNITED STATES CONSTITUTION

Article III, Section 2:

". . . The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."

Fifth Amendment:

". . . (N)or shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and . . . to be confronted with the witnesses against him . . ."

UNITED STATES CODE

21 U.S.C. §176a

"Insofar as here relevant, 21 U.S.C. 176a provides:

"Notwithstanding any other provision of law, whoever, knowingly, and with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned. . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Appendix B

In the United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Michael Dominic Mahoney, Defendant-Appellant.	No. 23,454
United States of America, Plaintiff-Appellee, vs. Charles Clarence Garcia, Defendant-Appellant.	No. 23,553

[May 12, 1970]

On Appeal from the United States District Court
for the District of Arizona

Before: Chambers, Merrill and Ely, Circuit Judges

Merrill, Circuit Judge:

Appellants, together with three codefendants (one Arellano, one Lewis and one Cortez), were indicted in two counts for conspiracy to smuggle marijuana and for smuggling 93 kilos of marijuana on November 30, 1967, in violation of 21 U.S.C. §176a. The trials of codefendants Lewis and Cortez were severed to permit them to testify as Government witnesses. Following jury trial appellant Garcia was convicted on both

counts; appellant Mahoney was convicted only on the conspiracy count.

The facts of the conspiracy were given in detail by Lewis. In the light of the errors assigned on this appeal we have, in the margin, set forth those facts as well as the circumstances under which evidence was obtained in the search of a Mustang automobile and its occupants.[1]

---

[1] The scheme originated with Garcia, who enlisted Lewis's help. They drove from the San Francisco Bay Area to Mexico, where Garcia made the necessary arrangements with Arellano. They then returned to the Bay Area, where Lewis enlisted Mahoney's assistance for the purpose of driving the "load" car back from Arizona to the Bay Area. He was promised $200 for the trip. Garcia, Lewis and Mahoney then drove to Yuma, Arizona, in Lewis's Dodge station wagon. Mahoney was left to wait at a Yuma motel where he was registered as "Mike Russell." Garcia and Lewis crossed the border in the Dodge to make final arrangements with Arellano.

In the meantime an informant had tipped off customs agents as to the forthcoming smuggling attempt. Both Arellano and Garcia were known to the agents as narcotics violators. Lewis and Garcia were observed at Arellano's home and in Arellano's company. The Dodge also was observed as was a Cadillac parked at the Arellano home. Later, Lewis drove the Dodge back to Yuma. Mahoney then drove him to the airport where Lewis rented a Mustang. Lewis crossed into Mexico in the Mustang while Mahoney returned to the motel in the Dodge. The informant tipped off the customs agents as to the presence of the Mustang. On November 30 the customs agents at the border were on the lookout for Arellano, Garcia and Lewis and for both the Cadillac and the Mustang.

The Cadillac crossed first, driven by Cortez, who had been paid $25 for the trip. The car was stopped and searched and the 93 kilos of marijuana were recovered. While the agents were questioning Cortez the Mustang crossed, occupied by Arellano and Lewis. It was (apparently inadvertently) passed without search. Garcia, a few minutes earlier, had entered on foot and had been searched and passed. He was observed to wave to the occupants of the Mustang when it entered.

The guards questioning Cortez were informed of the fact that the Mustang and Garcia had entered. They broke off their questioning and one of them took off in pursuit. He quickly caught up with Garcia and saw him enter the Mustang, then parked in front of a restaurant. The agent returned for his companion and called the sheriff's office to put a stop on the Mustang. The two customs

On appeal the principal question is the admissibility in evidence of the items found in the Mustang and on its occupants at the time of the search at the port of entry. Appellants contend that the search and seizure were not reasonable and that their motion to suppress should have been granted. The Government contends that the search was justified as a border search.

Since the stop for search was made away from the border the question presents problems similar to those dealt with in *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977, (1966), where it was stated:

> "Where, however, a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the

agents then followed the Mustang, having it either in sight or nearly in sight. The Mustang eventually was stopped by the sheriff's officers thirteen miles from the border and was held until the customs agents caught up. Arellano, Lewis and Garcia were then returned to the port of entry and the Mustang was driven back by one of the customs agents. At the port of entry the three co-defendants and the car were searched. No contraband was found, but evidence connecting the car and occupants with the Cadillac was recovered: four screws from the Cadillac's side panels, a jack and two hubcaps. Also found was a slip of paper containing the telephone number of the Yuma motel where Mahoney was awaiting word. The customs officers then proceeded to the motel, found and seized the Dodge station wagon and arrested Mahoney.

United States. Any search * * * which meets this test is properly called a 'border search.'"

In our judgment the facts here meet the standards there set forth. See also *King v. United States*, 348 F.2d 814 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965); *Rodriguez-Gonzalez v. United States*, 378 F.2d 256 (9th Cir. 1967). Mere suspicion of illegal activity is sufficient to sustain a search at the border, and certainly there was ample ground for suspicion in this case. We conclude that it was not error to deny appellants' motion to suppress.

Other assignments of error we find to be without merit.

There was ample evidence to support Mahoney's conviction. Lewis's testimony was corroborated by the presence of the Dodge station wagon at the Yuma motel, Mahoney's presence at the motel and his registration there under an alias.

Introduction of marijuana debris recovered from Arellano's jacket was, if irrelevant, not prejudicial. Sufficient chain of custody of the jacket was shown to render it competent.

Admission of the marijuana debris did not render the verdict void for uncertainty. The guilt found related to the offense charged in the indictment: that of smuggling the 93 kilos. *Plazola v. United States*, 291 F.2d 56 (9th Cir. 1961), is inapposite.

Reference by a customs agent in cross-examination by Arellano's counsel as to "other cases" in which

Argüano may have been involved was not prejudicial to these appellants.

It was not abuse of discretion to deny appellants' motion for severance of trial. *Daut v. United States*, 405 F.2d 312 (9th Cir. 1968). Nor do we find more than the usual prejudice that results from a joint trial.

One final assignment of error, does, however, require reversal as to Mahoney.

In this case the jury was instructed that 'from unexplained possession of marijuana a presumption may be drawn that the fact of importation was known. Since trial of this case, the United States Supreme Court, in *Leary v. United States*, 395 U.S. 6 (1969), has established that the giving of that instruction was error. *Leary* applies to this case under our recent holding in *United States v. Scott*, ... F.2d ..... (9th Cir. March 6, 1970).

Since the facts establishing smuggling (necessarily found by the jury) bespoke actual knowledge of importation, the giving of the presumption instruction was harmless error beyond a reasonable doubt as regards Garcia's conviction for smuggling. *United States v. Ryle*, ... F.2d ..... (9th Cir. April 3, 1970); *United States v. Simon*, ... F.2d ..... (9th Cir. March 30, 1970); *Plasencia-Plasencia v. United States*, ... F.2d ..... (9th Cir. March 25, 1970); *cf. Turner v. United States*, 396 U.S. 398, 420-21 (1970). Like reasoning also renders harmless any error affecting Garcia's conviction for conspiracy.

Mahoney's situation is different, however. He was not apprehended in the act of crossing the border. Proof of his knowledge that the marijuana, the subject of the conspiracy, was to be imported rests on the testimony of Lewis and the jury was presented with a question of credibility. Under these circumstances we cannot say beyond a reasonable doubt that the presumption did not affect the jury's determination that Mahoney had knowledge that the conspiracy involved importation.

As to appellant Garcia, judgment affirmed. As to appellant Mahoney, reversed and remanded for new trial.

Chambers, Circuit Judge, dissenting:

I dissent as to the reversal of the conviction of the appellant Mahoney. In my view, the error was clearly harmless.

s/ Richard H. Chambers
United States Circuit Judge

Appendix C

In The United States District Court
For The District Of Arizona

No. C-18001 Phoenix

United States of America,
Plaintiff,
vs.
Charles Clarence Garcia, Jr.,
Defendant.

JUDGMENT AND COMMITMENT

On this 22nd day of July, 1968, at Phoenix, Arizona, came the attorney for the government and the defendant appeared in person and by counsel.

It is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of violating Title 21, Section 176(a), United States Code (conspiracy to smuggle marihuana and smuggling marihuana) as charged in Counts I and II of the Indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period not to exceed ten (10) years on each of counts I and II; said sentences to run concurrently.

The Court recommends that the defendant be hospitalized for treatment as a possible addict of narcotics and for psychiatric evaluation.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Walter E. Craig
United States District Judge

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 293

CHARLES CLARENCE GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiracy to smuggle marijuana and of smuggling 93 kilos of marijuana on November 30, 1967, in violation of 21 U.S.C. 176a. He was sentenced to concurrent terms of ten years' imprisonment. The court of appeals affirmed (Pet. App. iii-viii).